

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7628

Joint Petition of Green Mountain Power Corporation,)
Vermont Electric Cooperative, Inc., and Vermont)
Electric Power Company, Inc. for a certificate of public)
good, pursuant to 30 V.S.A. Section 248, to construct up)
to a 63 MW wind electric generation facility and)
associated facilities on Lowell Mountain in Lowell,)
Vermont, and the installation or upgrade of)
approximately 16.9 miles of transmission line and)
associated substations in Lowell, Westfield and Jay,)
Vermont)

Order entered: 8/5/2011

**ORDER RE HIGH-ELEVATION WETLANDS MITIGATION PLAN AND FOREST
AND WILDLIFE HABITAT MANAGEMENT PLAN**

INTRODUCTION

On May 31, 2011, the Public Service Board ("Board") issued an Order (the "Order") and Certificate of Public Good ("CPG") in this docket approving, subject to certain conditions, the construction and operation of the proposed wind electric generating facility. Among other things, the Order required the Petitioners to make a number of post-certification compliance filings. On June 10 and 29, 2011, respectively, Green Mountain Power Corporation ("GMP") submitted its proposed High-Elevation Wetlands Mitigation Plan and Forest and Wildlife Habitat Management Plan for party comment and Board review. For the reasons set forth below, in this Order we approve both of the proposed plans.

High-Elevation Wetlands Mitigation Plan

Condition 31 of the CPG states:

The Petitioners must provide sufficient mitigation for impacts to high-elevation wetlands. The Petitioners must file their proposed mitigation for impacts to high-elevation wetlands with the Board for approval prior to commencement of

construction. Parties with standing will have two weeks, from the time the mitigation proposal is filed, to file comments and request a hearing. If a party requests the opportunity for a hearing, it must demonstrate why a hearing is necessary.

In its June 10, 2011, filing, GMP included a proposed High-Elevation Wetlands Mitigation Plan ("Mitigation Plan") for the proposed project. The Mitigation Plan indicates that the final project design plans decrease the amount of impacts to ridgeline or high-elevation wetlands, and increase the amount of existing high-elevation wetlands to be conserved. The plan states that the overall wetlands conservation/mitigation ratio for high-elevation wetlands is now 17.5:1, in excess of the 15:1 guideline established by the U.S. Army Corp of Engineers.¹ The Mitigation Plan includes a table that indicates the principal functions and values of the conserved wetland parcels, and GMP states that the underlying documentation for the table is contained in its wetland permit applications.²

In comments filed July 1, 2011, the Agency of Natural Resources ("ANR") states that the proposed Mitigation Plan was incorporated in the application materials for the Section 401 certification and state wetland permits that are currently under review by ANR. ANR concurs with the delineation of the additional wetlands to be conserved, and asserts that the wetlands are high value because the functions of the wetlands are for groundwater recharge/discharge and sediment/toxic retention. ANR agrees with GMP that the proposed project changes have resulted in a reduction in impacts to wetlands.

On June 30, 2011, the towns of Albany and Craftsbury (the "Towns") filed comments on the Mitigation Plan asserting that the plan does not address how the final design reduces indirect impacts to high-elevation wetlands.³ The Towns contend that GMP has failed to provide any analysis to support its claim that the functions and values of the conserved high-elevation wetlands are comparable to those being affected.⁴ The Towns also claim that the Mitigation Plan fails to demonstrate compliance with the compensation standards of Section 9.5 of the Vermont

1. GMP filing of 7/10/11, Attachment 4 at 2.

2. GMP Response to Towns at 3.

3. Towns Comments on Second Set of Filings at 23.

4. Towns Comments on Second Set of Filings at 24-25; Towns Reply to GMP Response at 4-5.

Wetland Rules ("VWR").⁵ The Towns further contend that GMP is relying on the Section 401 certification and Section 404 permit for mitigation, rather than supplying an analysis of how the wetlands to be conserved are comparable in function and value to the high-elevation wetlands being impacted by the project.⁶ Lowell Mountains Group ("LMG") adopts the Towns' comments.⁷

On July 21, 2011, GMP filed a letter with the Board in which it described earthwork activities recently undertaken by Mr. Wileman, the owner of the property where the project is to be located. The earthwork did not occur on the project site itself, but occurred on a parcel of land designated for conservation as Parcel 3 in the Natural Resource MOU.⁸ The earthwork apparently resulted in the placement of fill in a Class II wetland, and earth disturbance to the edge of an existing beaver pond, inside of an applicable 50-foot Class II wetland buffer.

On July 25, 2011, the Towns filed a response letter in which they assert that the proposed high-elevation wetlands mitigation may no longer be sufficient given the impacts to the Class II wetland and buffer on Parcel 3, and that the Petitioners must be required to resubmit a mitigation plan for high-elevation wetlands following a complete analysis of the impacts from the recent earthwork in Parcel 3, with parties having another opportunity to comment on the new plan.

As a result of the July 21 filing by GMP and the July 25 filing by the Towns, we withheld our ruling on the High-Elevation Wetlands Mitigation Plan when we issued our Order on July 27, 2011, addressing GMP's June 10, 2011, compliance filings. In a Memorandum dated July 25, 2011, the Board Clerk's Office gave parties with standing on natural resource issues until close of business on July 29, 2011, to file comments in response to the GMP and Town letters filed July 21 and 25, 2011, respectively.

On July 29, 2011, GMP filed comments in response to the Towns' letter of July 25, 2011. In those comments, GMP asserts that the Class II wetland that was impacted by Mr. Wileman's

5. Towns Comments on Second Set of Filings at 23.

6. Towns Reply to GMP Response at 5-6.

7. LMG Comments on Second Set of Filings at 1.

8. Exh. GMP-ANR-1.

earthwork is at approximately 1,590 feet of elevation.⁹ According to GMP, wetlands at this elevation are not considered high-elevation or ridgeline wetlands and are therefore not part of the Mitigation Plan. Therefore, concludes GMP, the Mitigation Plan is unaffected by Mr. Wileman's earthwork and remains adequate for the purpose for which it was intended.¹⁰

Also on July 29, 2011, the Agency of Natural Resources filed comments stating that the impacts to the Class II wetland and buffer zone on Parcel 3 do not affect the viability of the Mitigation Plan.¹¹

On August 3, 2011, the Towns filed a response to GMP's July 29, 2011, filing. The Towns suggest that GMP is being contradictory because its July 29, 2011, filing states that the impacted Parcel 3 wetland is not a high-elevation wetland, while the Mitigation Plan states that preservation of Parcel 3 is the primary mitigation for unavoidable water resource impacts from the project, it is significant that Parcel 3 lies at approximately 1,300 to 1,700 feet in elevation, and the wetlands within Parcel 3 are of similar characteristics and value as the high-elevation wetlands that will be impacted by the project. Because Parcel 3 contains the majority of the wetland acreage to be preserved under the Natural Resource MOU, the Towns argue that the mitigation ratio of preserved to impacted high-elevation wetlands could be negatively affected if the wetlands in Parcel 3 are not actually high-elevation as claimed by GMP.¹²

The project will result in permanent, temporary, and secondary impacts to both Class II and Class III wetlands, including high-elevation wetlands that function as headwaters. In our May 31, 2011, Order, we concluded that, without additional mitigation, the proposed project would result in a net undue adverse effect on high-elevation wetlands, and would therefore violate the VWR. We required the Petitioners to file a mitigation proposal for impacts to high-elevation wetlands for Board review and approval, including an analysis of how the wetlands to be conserved are comparable in function and value to those that will be impacted by the project,

9. GMP Reply to Towns Letter at 2. GMP's July 29 filing was accompanied by an affidavit of Jeffrey Nelson which supports this statement.

10. GMP Reply to Towns Letter at 2. Affidavit of Jeffrey Nelson at ¶ 14.

11. ANR Comments at 4.

12. Towns 8/3/11 Reply at 4-6.

and to demonstrate how the proposed mitigation complies with the compensation standards of VWR 9.5.

Section 9.5 of the VWR requires that any activity within a Class II wetland or its buffer zone have no undue adverse effect on protected functions and values.¹³ Project activity will occur in the buffer zone of two high-elevation Class II wetlands, and thus mitigation is required that is comparable in function and value to comply with the compensation standards of VWR 9.5. In addition, our May 31 Order did not limit the mitigation proposal to Class II high-elevation wetlands, but rather required the plan to address high-elevation wetlands generally. The proposed High-Elevation Wetlands Mitigation Plan provides an analysis that demonstrates that the Class II and Class III wetlands to be conserved are comparable in function and value to those that will be impacted by the project. ANR states that it concurs with this conclusion and that the proposed project changes have resulted in a reduction in the impacts to wetlands. The plan also demonstrates that the amount of overall high-elevation wetlands to be conserved will be significantly greater than the amount of high-elevation wetlands that will be impacted by the project.

We are not persuaded by the Towns' arguments that the Mitigation Plan provided an insufficient analysis. The Towns do not dispute the analysis contained in the Mitigation Plan, and instead claim the analysis is lacking in information or details. The Towns claim that the Mitigation Plan does not demonstrate how the final design plans reduce indirect impacts to high-elevation wetlands or identify the principal functions and values of the conserved high-elevation wetlands. This claim is without merit. The mitigation plan references a June 6, 2011, memorandum filed with the Board that provides an analysis of indirect impacts to high-elevation wetlands. The mitigation plan also includes a table of the conserved wetlands, and column 4 of that table provides the principal functions and values of the conserved wetlands.

Lastly, the Towns' argument regarding the wetlands in Parcel 3 is based on a flawed reading of the Mitigation Plan. The Mitigation Plan states that preservation of the Parcel 3

13. Section 9.5 also requires that there be no net loss of acreage of significant wetlands. Here, although the Generation Component of the project involves impacts in the buffers of significant wetlands, there is no loss of acreage of the significant wetlands themselves.

wetlands constitutes the primary mitigation for unavoidable water resource impacts from the project generally. It does not state that the wetlands within Parcel 3 are high-elevation. And while it does point to their elevation and notes that they have similar characteristics and values to the high-elevation wetlands that are being impacted, it specifically states that the Parcel 3 wetlands are not considered to be on a ridgeline. A careful reading of the Mitigation Plan reveals that the high-elevation wetlands that are preserved as part of the Mitigation Plan are located on Parcels 2 and 4.¹⁴ Furthermore, the table included with the Mitigation Plan that lists the conserved wetlands and their acreage does not list any Parcel 3 wetlands. It is the high-elevation wetlands on Parcels 2 and 4 that form the basis for the calculation of the mitigation ratio and thus the Parcel 3 wetlands are not relevant to our review of a mitigation proposal specific to high-elevation wetlands.¹⁵

Based on our review of the proposed High-Elevation Wetlands Mitigation Plan, we conclude that the Petitioners have provided sufficient analysis to demonstrate that the high-elevation wetlands it proposes to conserve are comparable in function and value to those that will be impacted by the project, and the proposed mitigation complies with the compensation standards of VWR 9.5. Accordingly, we approve the proposed High-Elevation Wetlands Mitigation Plan.

Forest and Wildlife Habitat Management Plan

In its June 29, 2011, filing, GMP included the Forest and Wildlife Habitat Management Plan for Parcels 1, 2, 3 and 4 identified in the Natural Resource MOU. The obligation for the Forest and Wildlife Habitat Management Plan initially arose as part of the Natural Resource MOU. Paragraphs 2.1.2.a., 2.2.2.a. and 3.1.2.c. of the Natural Resource MOU state that the Forest and Wildlife Habitat Management Plan for Parcels 1, 2 and 4 must be reviewed and approved by ANR and the Board. The Natural Resource MOU treats Parcel 3 differently, stating that it shall be managed in accordance with U.S. Army Corps of Engineers and ANR

14. Mitigation Plan at 2.

15. Our determination that the Parcel 3 wetlands are not relevant to our review of the Mitigation Plan is not an indication that we view the impacts to the Class II wetland and buffer zone on that parcel lightly. The Board is currently considering what steps to take given the recent disclosures, proposals and arguments filed by the parties.

recommendations. No development or commercial logging is allowed on Parcel 3, but timber management may be allowed at ANR's discretion.¹⁶ However, the Board's May 31, 2011, Order extended the requirement for a management plan to be reviewed and approved by the Board to Parcel 3.

On July 18, 2011, ANR filed a letter with the Board stating that it had reviewed and approved the Forest and Wildlife Habitat Management Plan with respect to Parcels 1, 2 and 4. On July 20, 2011, ANR filed another letter with the Board stating that it had reviewed and approved the Forest and Wildlife Habitat Management Plan with respect to Parcel 3 as well.

No other party filed any comments on the plan.

In its letter of July 21, 2011, GMP asked the Board to defer its ruling on the Forest and Wildlife Habitat Management Plan. Therefore, we did not address this plan in our Order of July 27, 2011, that addressed other compliance materials filed by GMP on various dates.

In its July 29, 2011, filing, GMP asked the Board to issue its decision on the Forest and Wildlife Habitat Management Plan .

Based on our review of the proposed plan, ANR's review and approval of the proposed plan, and the lack of any comments in opposition, the Petitioners' Forest and Wildlife Habitat Management Plan for Parcels 1, 2, 3 and 4 is approved.

CONCLUSION

The High-Elevation Wetlands Mitigation Plan and Forest and Wildlife Habitat Management Plan are approved.

SO ORDERED.

16. Exh. GMP-ANR-1 at ¶ 2.3.2.a.-b.

Dated at Montpelier, Vermont, this 5th day of August, 2011.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: August 5, 2011

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.